IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT KNOXVILLE
January 29, 2008 Session

STATE OF TENNESSEE v. QUINCY LONDALE SCOTT

Direct Appeal from the Criminal Court for Hamilton County
Nos. 244725, 244718, 238858 Don W. Poole, Judge

No. E2007-00393-CCA-R3-CD - Filed February 4, 2009

The appellant, Quincy Londale Scott, was convicted by a jury in the Hamilton County Criminal Court of facilitation of first degree murder, attempted especially aggravated robbery, carjacking, and two counts of aggravated robbery. He received a total effective sentence of thirty-seven years. On appeal, the appellant challenges the trial court's ruling on his motion to suppress his August 14, 2002, statement to police and the trial court's denial of his motion for a severance of the offenses. Upon review of the record and the parties' briefs, we conclude that the trial court erred in failing to sever the offenses; however, we conclude that the error was harmless and affirm the appellant's convictions.

Tenn. R. App. P. 3 Appeal as of Right; Judgments of the Criminal Court are Affirmed.

NORMA MCGEE OGLE, J., delivered the opinion of the court, in which JAMES CURWOOD WITT, JR., and D. KELLY THOMAS, JR., JJ., joined.

Daniel J. Ripper, Chattanooga, Tennessee, for the appellant, Quincy Londale Scott.

Robert E. Cooper, Jr., Attorney General and Reporter; Jennifer L. Bledsoe, Assistant Attorney General; William H. Cox, III, District Attorney General; and Neil Pinkston and Rachel Winfrey, Assistant District Attorneys General, for the appellee, State of Tennessee.

OPINION

I. Factual Background

On June 18, 2003, the Hamilton County Grand Jury returned indictment number 244725, charging the appellant in count one with the carjacking of Courrie Long's vehicle and in count two with the aggravated robbery of Courrie Long.[1] The grand jury also returned indictment number

[1] In the trial transcript, the spelling of the victim's name is "Cory Long." We have chosen to use the spelling utilized in the indictment.

244718, charging the appellant in count one with the first degree felony murder of Brian Scott Hall, in count two with the especially aggravated robbery of Brian Scott Hall, and in count three with the aggravated robbery of Morris Talley.

Prior to trial, the appellant filed a motion to suppress a statement he made to police on August 14, 2002, in which he related his involvement in the crimes. The trial court overruled his motion. Also prior to trial, the State moved to consolidate the charges from both indictments into a single trial. The appellant objected to the motion and instead moved to have the offenses involving each victim tried separately. The trial court overruled the appellant's motion for severance and granted the State's motion for consolidation. Thereafter, the case proceeded to trial.

The appellant's convictions were based upon the following proof of three events which all occurred within a few hours in the late night hours of July 30, 2002, and the early morning hours of July 31, 2002. The appellant gave a taped statement to police, summarizing the evening's activities. The statement, which was played for the jury, revealed that late in the evening on July 30, 2002, the appellant borrowed a small four-door vehicle from "Toya," otherwise known as Katara Holloway, who lived in the Woodlawn Apartment complex. Holloway testified that at 9:00 or 10:00 p.m. on July 30, 2002, she loaned her red 1992 Nissan Stanza to the appellant. Holloway said that at 9:00 a.m. the next morning, Mario Fulgham returned the car to her.

The appellant's statement revealed that after he got the vehicle from Holloway, he picked up his co-defendants, James "Baby James" Westbrook and Mario Fulgham. Latara K. Smith,[2] the appellant's cousin, verified that at approximately 9:20 p.m. on the night of July 30, 2002, the appellant and Fulgham came to her sister's residence, which was about a block away from Woodlawn Apartments, to pick up Westbrook. Latara Smith said that the appellant and Fulgham were in Holloway's red car. Smith testified that Fulgham retrieved guns from her sister's residence, and the three men left the residence together at approximately 10:30 or 11:00 p.m. According to the appellant's statement to police, Fulgham was driving the car. The appellant said that all of the perpetrators were wearing black clothes, toboggans, black bandanas, and black hoods. The appellant said that he was carrying a twenty gauge shotgun and that Westbrook was carrying an SKS assault rifle.

The appellant told police that while they were driving around, they robbed a man near the East Lake area. Morris Talley testified that he was robbed while walking on 25th Street near 4th Avenue in the East Lake area in the late night hours of July 30, 2002, or the early morning hours of July 31, 2002. The appellant told police that upon seeing Talley, his co-defendants said "[L]et's get him." The appellant and Westbrook jumped out of the vehicle, but Fulgham stayed in the vehicle. Talley saw the two men, wearing ski masks and carrying guns, jump out of the car. The appellant and Westbrook pushed Talley into the bushes. Talley recalled that one of the guns was an "AK, SK, something" assault rifle and that the other gun was also a "big gun." The appellant and Westbrook

[2] Some of the witnesses in this case share a surname. Therefore, for clarity, we have chosen to employ their first names. We intend no disrespect to these individuals.

demanded Talley's money. The appellant said that Westbrook fired a round. Talley gave the men his money, which he said amounted to $120 and some change. After the robbery, Talley ran across the street, and the perpetrators went the opposite way. Talley said that after he ran from the scene, he eventually "caught up with some other guys who had got carjacked or whatever." The appellant told police that Westbrook did not get anything from Talley. Police later collected a shell casing from the scene.

Latara Smith testified that the appellant, Westbrook, and Fulgham returned to her sister's residence some time before midnight on July 30, 2002. Latara Smith saw the appellant and Westbrook wipe down Holloway's red car. That was the last time Latara Smith saw the red car. The men left again after midnight.

The proof at trial revealed that at approximately 2:00 a.m., Brian Hall was making a call to Bernice Hudson from a pay telephone at a Citgo near 23rd Street. The appellant's statement revealed that at about that same time, Fulgham was driving the appellant and Westbrook in Holloway's red car in the area of 23rd Street. When the perpetrators saw Hall, Westbrook thought Hall might have money. Westbrook said, "[L]et's get him," and he jumped out of the car with the SKS assault rifle to rob Hall. The appellant said that he also jumped out of the car, still in possession of the shotgun, but Fulgham remained in the car. At trial, Hudson testified that during the call, the other end of the line went quiet. She testified that she heard someone who was not Hall say "give it up cuz, then they said turn your bitch ass over." Hudson heard nothing further except perhaps the telephone swinging on its cord. The appellant told police that Hall pushed the appellant's shotgun and that Westbrook shot Hall. The appellant thought Hall had been shot in the leg because he tried to run, then he fell. The appellant said he saw a small amount of blood on Hall's back. The appellant told police that he thought Westbrook might have gone through Hall's pockets but that he did not find anything.

The appellant's statement reflected that after the shooting, he and Westbrook went back to the car. Police later collected a shell casing from the scene which matched the casing collected at the scene of Talley's robbery. The medical examiner testified that Hall died as the result of a gunshot wound to the back and that the injury was caused by a high velocity projectile fired from a weapon such as a hunting rifle or a military-style assault rifle; however, the medical examiner explained that the injury could not have been caused by a shotgun.

The appellant said that after the murder, Fulgham drove the appellant and Westbrook back to Woodlawn Apartments where the perpetrators saw "Coco [Courrie Long] and them." The perpetrators knew Long and also knew about the rims on his car. Fulgham parked the car the appellant had borrowed, and the appellant and Westbrook approached Long. Fulgham did not follow. The appellant's statement reflected that he approached Long because he and Westbrook had not obtained any money from the first two victims.

Courrie Long and Dennis Bonds testified that at approximately 2:00 a.m. on July 31, 2002, they were in one of the Woodlawn Apartments' parking lots when they saw the appellant and Westbrook, who were wearing hoodies and carrying big guns, come around the corner. Long

testified that one of the men had an AK or SKS assault rifle and the other had a "gauge." Long testified that the perpetrators pointed their weapons at him and Bonds and demanded money from them. The appellant's statement revealed that Westbrook fired a shot then went through Long's pockets. Long also said that Westbrook fired a round and then took his money. The appellant said that he did not search the victims' pockets. Long and Bonds testified that the perpetrators retrieved less then one hundred dollars from each of them, then the perpetrators turned to leave. Long testified that they stopped and said, "You think we should have killed him, cuz?" Long said the men returned and took the keys to his car. The appellant's statement reflects that he and Westbrook took Long's car and left. Police later collected an SKS long rifle round from the scene.

An agent from the Tennessee Bureau of Investigation (TBI) laboratory testified that the shell casings collected from the three crime scenes were each 7.62 x 3 9 millimeter cartridge casings most commonly used in AK or SKS assault rifles. All three casings had been fired from the same weapon, an assault rifle.

Latara Smith testified that the appellant, Westbrook, and Fulgham returned to her sister's residence at about 5:00 a.m. on the morning of July 31, 2002. She recalled that Fulgham was the first to come in, and he made a "big scene" as he went through the residence. However, she said that the appellant was quiet. Latara Smith testified that when the morning news came on television, footage of crime scene tape around a telephone booth at the murder scene was played. She stated that when the newscaster announced that a man was shot at the scene, Fulgham laughed, but the appellant had no reaction to the news.

Latara Smith testified that when it began to rain that morning, the men tried to put the guns in a nearby ditch that had filled with water. She said that when the guns washed out of the ditch, the appellant and Westbrook handed the two long guns to Fulgham.

The appellant told police that he and Westbrook "went up to Summit" to take the rims off of Long's car. The appellant maintained that they took the car to "some kind of geek" who called Markee Crutcher to deal with the car. Robert Lee Smith testified that he was a distant relative of the appellant. On July 31, 2002, Markee Crutcher called Robert Smith and said that he and the appellant had "bought a car up in Summitt" and wanted him to take a look at the vehicle. Robert Smith said that Crutcher wanted him to take the wheels and engine from the car and put the parts onto another car. Robert Smith identified the car from a photograph of Long's vehicle. When Robert Smith saw the appellant and another man on School Street, a couple of rifles were in the backseat of the car. Later, when Robert Smith and a girl picked up the car, the guns were no longer in the backseat. Robert Smith and the girl took the car back to Smith's house at 4609-A Green Shanty Road. Police later found Long's car at Robert Smith's residence.

The appellant told police that when they left the car with Crutcher, Westbrook took the guns. Then, the appellant and Westbrook went back to the house where Fulgham was staying. The appellant said that he later retrieved the guns and left them in the bushes near "the projects."

The jury found the appellant guilty of the facilitation of the first degree murder of Hall, the attempted especially aggravated robbery of Hall, the carjacking of Long, the aggravated robbery of Long, and the aggravated robbery of Talley. On appeal, the appellant challenges the trial court's ruling on the suppression motion, the motion to consolidate, and the appellant's motion to sever the offenses.

II. Analysis

A. Motion to Suppress

In the appellant's first issue, he challenges the trial court's failure to exclude the statement he made to police on August 14, 2002, on the ground that the statement was not knowingly and voluntarily made. At a hearing on the motion to suppress, Detective Phillips testified that the appellant, Westbrook, and Fulgham were developed as suspects in the offenses. Therefore, on August 7, 2002, Investigator Thompson located the appellant and brought him to Detective Phillips' office at the Chattanooga Police Department where he voluntarily submitted to an interview. Detective Phillips said that the appellant was not in custody and had not been charged at the time of the interview. Prior to the interview, Detective Phillips explained to the appellant the reason for the interview, and he informed the appellant of his Miranda rights. The appellant signed a form waiving his Miranda rights. Detective Phillips said that the appellant did not ask for an attorney and that nothing indicated the appellant might be under the influence of any intoxicating substance.

During the first statement, the appellant did not admit any involvement in the crimes. He merely said that he had heard of the offenses the day after they occurred. After the interview, the appellant was not charged with any offense, and he was allowed to leave.

On August 14, 2002, after the appellant was implicated in the offenses by one of the perpetrators, Detective Phillips again interviewed the appellant. At the time of the second interview, the appellant was incarcerated in the Hamilton County Jail because of a probation violation and was brought to Detective Phillips' office from his cell. Detective Phillips again advised the appellant of his Miranda rights, and the appellant executed a waiver of those rights. Detective Phillips said that the appellant never asked for an attorney. Detective Irwin and Detective Thompson were also present for the interview.

At the beginning of the interview, Detective Phillips informed the appellant that police had taken a statement from Westbrook. The appellant asked for proof, and Detective Phillips played a small part of Westbrook's audiotaped interview. Detective Phillips explained that he wanted to assure the appellant that he was not lying about having interviewed Westbrook but that he did not want to give the appellant enough information to taint his statement.

Detective Phillips said that during the August 14 interview, the appellant admitted being at the site of the offenses with Westbrook and Fulgham. The appellant said that on 4th Avenue, the three men stopped a man from East Lake Courts and robbed him. After the robbery, the appellant

and Westbrook got back into the red Nissan and drove to South Hickory and 23rd Street where they saw Hall talking on a pay telephone. The appellant and Westbrook got out of the car to rob Hall. During the robbery, Westbrook shot and killed Hall. The appellant's statement also reflects that when he and Westbrook returned to Woodlawn Apartments, they approached "Coco [Courrie Long] and them." Westbrook "went in they pockets," and he and the appellant took Long's car. After the interview, the appellant was arrested and charged with the offenses. Detective Phillips asserted that no force or coercion was used during the interview. Further, the appellant did not appear to be intoxicated or under the influence of any substance.

At the hearing, the appellant testified that he had prior exposure to the legal system. The appellant said that both of the waiver forms, purporting to be from the first and second interviews, reflected the date of the first interview, August 7, 2002. He said that he signed both forms at the time of the first interview. He signed the first form at the beginning of the interview then signed a second form after he was told that the first waiver form had been lost. The appellant denied executing a waiver form before the August 14 interview.

The appellant said that he could read and write, but he maintained that his reading ability was poor. The appellant said that he had an eighth-grade education and did not have a general equivalency diploma. The appellant said he signed the Miranda form at the August 7 interview, but he did not read the form before signing it. He acknowledged that police told him of his rights and read the waiver form to him. The appellant said he understood his rights when he signed the waiver form. The appellant said that the August 7 interview lasted one or two hours and that he did not ask for a lawyer during that interview. During the August 7 interview, the appellant denied his involvement in the offenses.

The appellant said that he had been unable to sleep while he was in jail. The staff of Moccasin Bend had given his cellmate pills to help him sleep, and, prior to the August 14 interview, the appellant had taken some of his cellmate's pills. When police came to get him for the August 14 interview, they had to wake him from his drug-induced sleep. The appellant said he was not used to taking pills, and, after being awakened, he felt tired, "funny," and could hardly get up. The appellant said that he was only "halfway there" during the interview.

The appellant stated that he "barely remember[ed]" what happened during the August 14 interview. However, he did recall that he asked for a lawyer prior to giving a statement. The appellant did not inform police that he was on medication. During the interview, he told police that he was involved in the robberies, carjacking, and murder. He said that he pointed a gun at Hall but that Westbrook shot him. The appellant recalled that he and Westbrook later carjacked a car that they planned to sell. The appellant maintained, "I was there talking [during the interview], but I wasn't – I knew where I was at, but they telling me what I done, what I'm going to say."

At the conclusion of the suppression hearing, the trial court found that the appellant knowingly and voluntarily gave both statements to police. The court further found that on August 14, the appellant "knew exactly what he was doing. And if he was sleepy or under some medication,

that certainly didn't affect him enough to make his statement involuntary." On appeal, the appellant challenges this ruling.

In reviewing a trial court's determinations regarding a suppression hearing, "[q]uestions of credibility of the witnesses, the weight and value of the evidence, and resolution of conflicts in the evidence are matters entrusted to the trial judge as the trier of fact." State v. Odom, 928 S.W.2d 18, 23 (Tenn. 1996). Thus, "a trial court's findings of fact in a suppression hearing will be upheld unless the evidence preponderates otherwise." Id. Nevertheless, appellate courts will review the trial court's application of law to the facts purely de novo. See State v. Walton, 41 S.W.3d 75, 81 (Tenn. 2001). Furthermore, the State, as the prevailing party, is "entitled to the strongest legitimate view of the evidence adduced at the suppression hearing as well as all reasonable and legitimate inferences that may be drawn from that evidence." Odom, 928 S.W.2d at 23. Moreover, we note that "in evaluating the correctness of a trial court's ruling on a pretrial motion to suppress, appellate courts may consider the proof adduced both at the suppression hearing and at trial." State v. Henning, 975 S.W.2d 290, 299 (Tenn. 1998).

Our review of the record reveals that Detective Phillips testified that the appellant was lucid during the August 14 interview. The appellant's answers to the questions posed by police were thoughtful and coherent. The evidence adduced at the suppression hearing reflects that the appellant signed a waiver of his Miranda rights prior to giving the statement. Moreover, Detective Phillips testified that the appellant did not request counsel. The trial court accredited the testimony of the detective and found that the appellant knowingly and voluntarily made his statement. The record does not preponderate against this ruling.

B. Consolidation/Severance

In his second issue, the appellant contends that the trial court erred by failing to sever the offenses. He maintains that identity was not an issue at trial and that admission of proof of the other offenses resulted in the jury inferring that he had a propensity to commit crimes. The State insists that the trial court correctly consolidated the cases because the offenses were part of a common scheme or plan and evidence of one crime would be admissible in the trial of the other.

At the severance hearing, Detective Phillips testified that in the early morning hours of July 31, 2002, he was driving to the scene of a reported homicide at 1700 East 23rd Street when he heard reports of a carjacking at Woodlawn Apartments, about five miles north of East 23rd Street. The homicide had been reported at 2:51 a.m. When Detective Phillips arrived at the Citgo, the scene of the homicide, the victim, Brian Hall, was lying in the parking lot and was already dead. An SKS shell casing was discovered at the scene.

Later, Detective Phillips went to Woodlawn Apartments, the scene of the carjacking. Detective Phillips recalled that "three or four guys that live in the Woodlawn or that area" told him that three black males with masks came up to them, demanding money and Long's vehicle. An SKS shell casing, which matched a casing discovered at the murder site, was discovered at the scene of the carjacking.

Detective Phillips learned that before the murder, a robbery had occurred just outside East Lake Courts off 4th Avenue, a few blocks from the murder. Witnesses to the robbery said that two black males wearing masks and carrying guns got out of a red Nissan Stanza and demanded money. A shot was fired. A SKS shell casing discovered by police at the scene of the robbery matched casings found at the scenes of the murder and carjacking.

Detective Phillips explained that although the robbery at 4th Avenue was the last to be reported, it was the first to occur. The second event chronologically was the murder at East 23rd Street. The carjacking was the final event of the evening, occurring approximately twenty-two minutes after the murder.

Detective Phillips stated:

> What we gathered from confessions later was that after they did the robbery on 4th Avenue they drove down towards Hickory Street, turned north on Hickory. And when they turned north on Hickory and approached 23rd Street, which is only a few blocks from 4th Avenue, the 1700 block of East 23rd Street, they saw a black male standing at a gas station talking on a pay phone. They pulled in there and two of the three black males, which would have been [the appellant] and James Westbrook, got out of the car and demanded money.

The appellant's statement reflected that during each offense, he and Westbrook were wearing dark hoodies and black bandanas to cover their faces. The appellant also told police that during each offense, he carried a shotgun and Westbrook carried an SKS assault rifle which Westbrook fired at each location. Additionally, the appellant said that Fulgham was driving the red Nissan during the first two crimes and that they had just returned the red Nissan to the Woodlawn Apartments when the carjacking was committed. All of the incidents occurred within a short time span. The appellant's statement indicates that the perpetrators' plan for the evening was to ride around and attempt to gain money via robbery.

At the conclusion of the hearing, the trial court said:

> [L]ooking at the elements of the subject offense here, the number and description of the perpetrators - and I know we started out with three and then we had two, but close to the same number - the use of masks, the use of a gun, are so distinctive as to be probative on the issue of identity thus the offenses in this case constitute part of the common scheme or plan, as Rule 14(b)(1) requires.

The court also found that the identity and intent of the perpetrators of all three offenses would be an issue at trial. The court determined that "evidence of the common and distinctive elements of each

offense is relevant one on the other, and/or the other issue, thus evidence of such offenses is relevant to some material issue in the trial of all the other offenses, as Rule 404(b)(2) requires." Finally, the court ruled that the evidence would not be unfairly prejudicial. The appellant renewed his motion for severance at the conclusion of the State's proof, and the trial court again denied the motion.

The consolidation and severance of multiple indictments for trial is governed by Rule 13 of the Tennessee Rules of Criminal Procedure. Rule 13(a) provides that the trial court may order consolidation "if the offenses and all defendants could have been joined in a single indictment, presentment, or information pursuant to Rule 8." Tenn. R. Crim. P. 13(a). Rule 8(b) states that two or more offenses may be consolidated if "the offenses constitute parts of a common scheme or plan" or if "they are of the same or similar character."[3] See Tenn. R. Crim. P. 8(b). However, Rule 13(b) provides that the trial court may order severance of offenses prior to trial if such severance could be obtained on motion of a defendant or the State pursuant to Rule 14. See Tenn. R. Crim. P. 13(b). Tennessee Rule of Criminal Procedure 14(b)(1) provides that "[i]f two or more offenses have been joined or consolidated for trial pursuant to Rule 8(b), the defendant has the right to a severance of the offenses unless the offenses are part of a common scheme or plan and the evidence of one would be admissible in the trial of the others."

Our supreme court has held that "decisions to consolidate or sever offenses pursuant to Rules 8(b) and 14(b)(1) are to be reviewed for an abuse of discretion." State v. Shirley, 6 S.W.3d 243, 247 (Tenn. 1999). "A holding of abuse of discretion reflects that the trial court's logic and reasoning was improper when viewed in light of the factual circumstances and relevant legal principles involved in a particular case." State v. Moore, 6 S.W.3d 235, 242 (Tenn. 1999). As a trial court must decide the motion based solely upon evidence adduced at the hearing on the motion, this court should look to that evidence and the trial court's findings of fact and conclusions of law to determine whether the trial court's ruling was an abuse of discretion. Spicer v. State, 12 S.W.3d 438, 445 (Tenn. 2000).

As we have noted, in the instant case the State moved to consolidate the cases involving the three victims, and the appellant opposed the motion. Our supreme court has explained that "when a defendant objects to a pre-trial consolidation motion by the state, the trial court must consider the motion by the severance provisions of Rule 14(b)(1), not the 'same or similar character' standard of Rule 8(b)." Spicer, 12 S.W.3d at 443. Additionally, "[w]hen there is an objection to a motion to consolidate, the State bears the burden of producing evidence to establish that the consolidation is proper." State v. Dotson, 254 S.W.3d 378, 387 (Tenn. 2008). It is within a trial court's discretion to consolidate cases if the offenses are part of a common scheme or plan and if evidence of one case is admissible in the other(s). See Tenn. R. Crim. P. 14(b)(1); Dotson, 254 S.W.3d at 386 n. 5.

In examining a trial court's determination on a severance issue, the primary consideration is whether the evidence of one offense would be admissible in the trial of the other if the offenses remained severed. Spicer, 12 S.W.3d at 445. Essentially, "any question as to whether offenses should be tried separately pursuant to Rule 14(b)(1) is 'really a question of evidentiary relevance.'"

[3] Our analysis proceeds under the permissive joinder provision of Rule 8 because we can discern no evidence supporting mandatory joinder of these offenses. See Tenn. R. Crim. P. 8(a).

Id. (quoting Moore, 6 S.W.3d at 239). As such, the trial court must determine from the evidence presented that:

> (1) the multiple offenses constitute parts of a common scheme or plan, (2) evidence of [the] offense is relevant to some material issue in the trial of . . . the other offenses, and (3) the probative value of the evidence of other offenses is not outweighed by the prejudicial effect that admission of the evidence would have on the defendant.

Id. (citations omitted); see also Dotson, 254 S.W.3d at 386 n. 5.

Common scheme or plan evidence tends to fall into one of three categories:

> (1) offenses that reveal a distinctive design or are so similar as to constitute "signature" crimes; (2) offenses that are part of a larger, continuing plan or conspiracy; and (3) offenses that are all part of the same criminal transaction.

Moore, 6 S.W.3d at 240.

The State argued in its written motion to consolidate that "the offenses charged are based upon the same conduct or arose from the same criminal episode." However, on appeal, the State contends that the crimes were part of a common scheme or plan. Our review of the record reveals that the appellant's offenses were not part of the same criminal transaction. Therefore, consolidation was proper only if the offenses were of a distinctive design or were so similar as to constitute "signature" crimes. Specifically, "[e]ven though offenses may be similar in many respects, they can not be classified as signature crimes if they lack a distinct modus operandi." Shirley, 6 S.W.3d at 248. Furthermore, this court has previously noted, "A common scheme or plan for severance purposes is the same as a common scheme or plan for evidentiary purposes." State v. Hoyt, 928 S.W.2d 935, 943 (Tenn. Crim. App. 1995), overruled on other grounds by Spicer, 12 S.W.3d at 447.

Upon compliance with Rule 404(b), evidence that a defendant committed a harmful act other than the one for which he is on trial may be admissible. See Neil P. Cohen et al., Tennessee Law of Evidence, § 4.04[7][a] (LEXIS publishing, 5th ed. 2005). Establishing the identity of an offender is the most common basis for presenting evidence of a distinctive design. See Shirley, 6 S.W.3d at 248. However, identity is not the only basis for presenting evidence of a distinctive design. Other crimes evidence is also admissible to show motive, intent, guilty knowledge, absence of mistake or accident, or a common scheme or plan for commission of two or more crimes so related to each other that proof of one tends to establish the other. See Hoyt, 928 S.W.2d at 944.

The proof adduced at the severance hearing revealed several similarities in the offenses. The robberies occurred within a time span of a few hours and within a distance of a few miles. During the robbery of Talley and the homicide of Hall, Fulgham drove a red Nissan Stanza while the appellant and Westbrook approached the victims. Shortly after returning the Nissan to the

Woodlawn Apartments, the appellant and Westbrook carjacked and robbed Long and Bonds. All of the witnesses identified at least two black, male perpetrators who were wearing masks and dark hoodies and carrying guns. Additionally, the witness' descriptions of the guns used in the offenses were consistent. In all three instances, the appellant and Westbrook wore black clothing and masks and were armed with a shotgun and an assault rifle, respectively. In each situation, they demanded money from the victims. At the murder, one of the perpetrators told Hall to "give it up cuz." At the carjacking, one of the perpetrators asked the other, "You think we should have killed him, cuz?" Additionally, Westbrook fired a shot at all three locations; however, Hall was the only one struck. Shell casings consistent with the same assault rifle were found at all three locations.

We agree that there are similarities in the methods used to commit the offenses, namely the use of guns and masks as well as the demands for money and property, which are common elements of the charged offenses. See Shirley, 6 S.W.3d at 249. However, these elements are "not so unusual that reasonable people would conclude that the same person[s] committed all of the offenses." Id. In other words, the elements are not so unique or distinctive that they can be said to constitute a "modus operandi." State v. Denton, 149 S.W.3d 1, 14 (Tenn. 2004).

Regardless, even if the offenses qualified as "signature crimes," consolidation was only permissible if evidence of one offense was admissible at the trial of the others. Id. Our supreme court has cautioned that "when the theory of common scheme or plan is grounded upon a distinctive design or 'signature' crime, usually the only reason to allow admission of the other offenses is to establish the identity of the defendant." Id. In the instant case, although the witnesses to the crimes were unable to positively identify the appellant as one of the perpetrators, they were able to identify Westbrook. However, the appellant did not dispute that he was involved in the offenses. Indeed, his second statement to police clearly reflects that the appellant was a participant in each crime. Instead, the appellant challenged only his level of culpability for each offense. Therefore, identity was not an issue. See id. Further, our review of the record reveals that evidence of the other crimes did not help to establish motive, intent, guilty knowledge, or absence of mistake or accident. See Hoyt, 928 S.W.2d at 944. In fact, the appellant's statement clearly reflects that he, Westbrook, and Fulgham were together that night with the intent to rob someone for money. Thus, we conclude that the trial court erred in denying the appellant's motion for severance.

However, our analysis is not complete. We must determine the effect of this error. Recently, our supreme court explained that to determine harmless error in severance cases, the proper inquiry "is to determine what harm, if any, the [appellant] suffered as a result of the improper joinder of the offenses and whether the gravity of the error warrants a new trial." Dotson, 254 S.W.3d at 388. As the Dotson court explained, no conviction should be reversed on appeal "'except for errors which affirmatively appear to have affected the result of the trial on its merits.'" Id. (quoting Tenn. R. Crim. P. 52(a)); see also Tenn. R. App. P. 36(b). When determining the effect of an error, "considering the whole record, '"[t]he more the proof exceeds that which is necessary to support a finding of guilt beyond a reasonable doubt, the less likely it becomes that an error affirmatively affected the outcome on its merits."'" Id. (quoting State v. Tolliver, 117 S.W.3d 216, 231 (Tenn. 2003)). In other words, "[t]he key question is whether the error likely had an injurious effect on the jury's decision-making process. If the answer is yes, the error cannot be harmless." Id. at 389.

In Dotson, the defendant was tried on charges relating to four separate events. At trial, Herbert Crain, a delivery truck driver, testified that he was approached by an individual as he was unloading the trailer of his truck and was ordered to go outside. When Crain attempted to close the perpetrator in the trailer, the perpetrator threatened to shoot Crain. The perpetrator, assisted by another person, then unloaded 128 cartons of cigarettes before driving away. Crain was unable to identify Dotson as the perpetrator; however, Crain's assistant was able to identify Dotson. Id. at 383-84. Gabriel Shears, Jr. testified that less than a month after the robbery of Crain, he and Keith Richardson were loading a dolly with cigarettes from a tractor trailer when Dotson entered the trailer of the truck and began unloading the cases of cigarettes. Dotson was again assisted by another person. A scuffle ensued, and Dotson threatened to shoot Richardson. Id. at 384. Willis Yarbrough testified that approximately a week after the Shears/Richardson robbery, he was working inside the cargo area of a delivery truck when Dotson appeared, brandished a gun, and ordered Yarbrough to go to the front of the trailer. Then, Dotson, with the help of another individual, unloaded cases of cigarettes from the truck. Id. Finally, DeAngelo Mitchell testified that about two weeks after the Yarbrough robbery, he was inside the trailer of a delivery truck, helping to unload cases of cigarettes, when Dotson entered the trailer. Dotson showed Mitchell that he had a pistol and ordered Mitchell not to move. The appellant and a second perpetrator unloaded cases of cigarettes from the truck. The Mitchell robbery was quickly reported to police, and police stopped a car matching the description of the perpetrators' vehicle. The perpetrators fled on foot, and police gave chase, apprehending Dotson and another man. Id. at 384-85. Dotson testified and denied involvement in three of the offenses. However, he admitted that he stole cigarettes from Mitchell but denied having a weapon. Id. at 385. Dotson was ultimately convicted of the robbery of Crain, Shears, and Richardson, and the aggravated robbery of Yarbrough and Mitchell. Id.

The court in Dotson determined that the trial court erred in failing to grant Dotson's motion for severance. In examining the effect of the error, the court noted:

> While clearly sufficient to convict on each charge, the nature of the evidence presented against [Dotson] as to each and every element of the two robbery charges and the two indictments for aggravated robbery varies in quality and degree. In two of the robberies, there were two employees who witnessed the crimes; in each instance, one of the two victims made a positive identification. In the others, the one employee who was involved identified [Dotson]. At trial, however, the jury heard the collective testimony of all four eyewitnesses on each indictment. The similarity of the crimes, where the risk of prejudice is higher, naturally buttressed the State's theory on all charges and their various elements. Because the trial court erroneously refused to sever each indictment and provide separate trials, our obvious concern is whether a single jury could independently assess each charge on its individual merits. Any inference that [Dotson] had a propensity to rob cigarette delivery trucks would have been perfectly logical.

Id. at 389 (citation and footnote omitted).

We conclude that the instant case is distinguishable from Dotson. In Dotson, the State's proof was based primarily on the collective testimony of the eyewitnesses to the offenses. As our supreme court noted, the quality and degree of the testimony varied as to each offense. Id. The court concluded that "[t]he similarity of the crimes, where the risk of prejudice is higher, naturally buttressed the State's theory on all charges and their various elements." Id. Such is not the case here. First, we note that the appellant gave a detailed confession, clearly revealing his participation in each of the three offenses. Moreover, his confession was corroborated by the testimony of Talley, Long, and Bonds regarding the elements of each offense. Further, the shell casings found at each of the scenes were consistent with the type of gun Westbrook was alleged to have used. Additionally, Latara Smith's testimony reveals that, as the appellant said in his confession, the appellant, Fulgham, and Westbrook went out together that night in Holloway's vehicle and the three men were armed with guns consistent with those described in the appellant's confession and in the witnesses' testimony. Explaining its conclusion in Dotson, our supreme court stated that "we cannot be sure as to what evidence might have tipped the scales in favor of the State" and surmised that the jury likely convicted Dotson based upon his propensity to commit such crimes. Id. at 390. Unlike Dotson, the critical evidence in the instant case was the appellant's confession detailing his role in each of the offenses. This leads us to conclude that the jury did not rely upon propensity evidence to convict the appellant.

Finally, we note that the appellant was not convicted of the charged offense of felony murder; he was convicted of the lesser-included offense of facilitation of first degree murder. This verdict is a clear indication that the jury evaluated each charge and reached a verdict based on the individual proof of each offense. We conclude that the error in failing to sever the offenses did not have " an injurious effect on the jury's decision-making process." Id. at 389. Therefore, the error was harmless.

III. Conclusion

Based on the foregoing analysis, the judgments of the trial court are affirmed.

NORMA McGEE OGLE, JUDGE